HIGH COURT OF UTTARANCHAL AT NAINITAL.

(Court's order whether the case is or not approved for reporting)
(Chapter VIII Rule 32 (2) (b)

Description of the Case.

(1)Criminal Appeal No. 320 of 2002

Ramzan. .... Appellant

Versus

State of Uttaranchal. .... Respondent

Connected With
(2)Criminal Appeal No. 162 of 2003

State of Uttaranchal. ..... Appellant

Versus

Nannu and another. ... Respondents

Approved for reporting.
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Not approved for reporting.

Date of Decision 16th October 2004.

Initial of Judge.

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IN THE HIGH COURT OF UTTARANCHAL
AT NAINITAL

Reserved

(1)Criminal Appeal No. 320 of 2002

Ramzan S/o Mangta,
R/o village Lalchandwala,
P.S. Mangalore, District- Haridwar. ....Appellant

Versus

State of Uttaranchal. ...Respondent

Sri Alok Singh, learned senior counsel for the appellant
Sri Amit Bhatt, learned Addl. G.A. for the State

Connected With
(2)Criminal Appeal No. 162 of 2003

State of Uttaranchal. ....Appellant

Versus

1. Nannu S/o Sri Mangta,
2. Dhani S/o Sri Mangta,
   Both R/o village Lalchandwala,
   P.S. mangalore,
   District Haridwar. .....Respondents

Sri Amit Bhatt, learned Addl. G.A. for the appellant
Sri Alok Singh, learned senior counsel for the respondents.

Coram : Hon'ble M.M. Ghildiyal, J.
Hon'ble B.C. Kandpal, J.

(Delivered by Hon'ble B.C. Kandpal, J.)

These criminal appeals arise out against the judgment and order dated 03.12.2002 passed by Sessions Judge, Haridwar in S.T. Suit No. 319 of 1999 State Vs. Ramzan and others under Section 302/34 I.P.C. by which the appellant Ramzan was convicted under Section 302 I.P.C. and awarded life imprisonment and a fine of Rs. 3,000/- and in default of payment of fine further imprisonment for 6 months. The trial

court vide the same judgment and order acquitted the accused Nanu and Dhani.

Brief facts of the prosecution case are that on 14.01.99 when Sukha S/o Shri Rahamtulla was going along with the deceased Shaheed on a buffalo cart enters near Mirzapur square, the accused persons namely Ramzaan, Nanu and Dhani S/o Shri Mangta appeared at the place of the occurrence and asked the complainant Sukha and his companion shaheed to stop. Complainant asked the reason to the accused persons but they pushed him aside and accused, namely, Nanu and Dhani (Non-Appellant) caught hold Shaheed. Therefore accused Ramzan fired at Shaheed with a country made pistol. On raising alarm by the complainant the accused persons made their escape good. This occurrence was witnessed by Manjur Hasan and Naseem.

Shaheed died at the spot.

The First Information Report of the aforesaid incident was lodged by Sukha on 14.01.99 at 9:30 PM at Police Station, Manglore.

After the case was registered at the police station, Manglore, the police reached at the spot but due to the darkness, the inquest on the body of the deceased could not be prepared. However, the Investigating Officer completed other formalities in the light of the torch.

The inquest on the body of the deceased Shaheed was performed by the Investigating Officer on 15.01.99 in the morning. The police thereafter sent the body of the deceased for postmortem.

On 15.01.99 at 1:00 p.m. the autopsy on the body of the deceased Shaheed was conducted by the Dr. Rajeev Verma (P.W. 6). The doctor found fired arm wound of injury measuring 5cm X 4cm on front and right side of the neck. The doctor also found burning and tattooing present around the wound. On internal

examination the doctor found 5 and 6 cervical vertebrae fracture. The doctor opined that the death was caused due to shock of brain haemmorahage with a result to fire arm injury. The duration of the death was considered to be ½-1 day prior to the postmortem.

The Investigating Officer recorded the statement of the witnesses prepared the site plan and thereafter submitted the chargesheet against the accused persons, namely, Ramzan (appellant) and two others Nanu and Dhani (Non-appellant).

After the submission of the chargesheet the accused persons were committed to the court for Sessions and the learned trial court on 24.09.99 framed the charge sheet under Section 302/34 I.P.C. against the accused persons.

The accused persons denied of the charges levelled against them and claimed their trial.

The prosecution in order to bring the guilt of the accused persons to home produced Sukha (PW 1), Naseem (PW 2), Manjoor Hasan (PW 3), Rajendra Kumar Sharma (PW 4) S.I. Atar Singh (PW 5), Dr. Rajeev Verma (PW 6), Dr. Moh. Mursleen (PW 7), and Constable Balram Singh (PW 8).

After the evidence of the prosecution was over, the statement of the accused persons were recorded under Section 313 Cr.P.C. The accused persons produced D.W.1 Pankaj Kumar Saxena D.W.2 Makhanlal and D.W.3 Meghraj in their defence.

The learned trial court after having perused the entire evidence on record and hearing the learned counsel for the parties, convicted the accused Ramzan under Section 302 I.P.C. and sentenced thereon for life imprisonment as well as a fine of Rs. 3,000 and in default, further RI for six months vide judgment and order dated 03.12.02.

The Learned trial court vide same judgment and order acquitted the rest of the accused persons, namely, Nanu and Dhani for the charge under Section 302/34 leveled against them.

Feeling aggrieved by the aforesaid impugned judgment and order the accused/appellant Ramzan preferred appeal before this Court, which has been placed before us for disposal.

The State Government has also filed an appeal against the same judgment and order acquitting the accused Nanu and Dhani.

We have heard learned counsel for the parties and perused the record.

Both the criminal appeals are connected, hence we are deciding both the appeals together.

Learned Counsel for the appellant has first of all argued before us that the first information report in the present case is anti timed. He has invited our attention towards the case crime number mentioned in the Chik report as 2/9/99. He has, therefore, submitted that this type of crime number mentioned in the documents creates a doubt as to whether the first information report was in existence at the alleged time stated by the prosecution. He has further submitted that in view of the assessment of the evidence adduced by the prosecution, the first information report could not have been so prompt. He has invited our attention towards the statement of PW 1 who has stated that after the incident, the information was sent to the village from there and a lot of persons assembled at the spot. Thereafter, PW 1 Sukha went to the police outpost and the written report was scribed over there in order to register the case. It has been submitted that in view of these circumstances the first information report could not have been lodged at 9:30 p.m. at the police station in any case.

It has also been submitted that as per the statement of PW 1 Sukha, PW 7 Mursleen who is the scribe of the first information report reached at the spot after about 45 minutes of the occurrence and thereafter informant Sukha went to the police outpost on foot and at police outpost the report was scribed. Therefore, in these circumstances again it was not possible for the information to have lodged the first information report at 9:30 P.M.

We fail to appreciate the arguments advanced by the learned counsel for the appellant. The incident in the present case has taken place at 8:00 P.M. at Mirjapur crossing. The distance of the police outpost is 1&1/2 Kms. from the place of occurrence. PW 1 Sukha has stated that it took approximate half an hour to reach the police outpost and again it took about half an hour in the registration of the case. Therefore, if this statement is taken into account then it is possible that the report could be very well lodged at police station at 9:30 p.m.

In the statement of the witnesses produced before the Court, we do not find any material contradiction, which may suggest that the first information report was lodged after consultations in order to concoct a cock-bull story.

As far as mentioning of the crime number over the documents as 2/9/99 is concerned, the same may be on account of the fact that the first information report was lodged at police outpost and not at the police station. All the documents, i.e., the Chik report, G.D. of the police outpost as well as the first information report clearly show that the case crime number was 2/9/99 u/s 302 IPC. The incident in this case took place at 8:00 P.M. on 14.01.1999, while the first information was lodged on 14.09.1999 at 9:30 P.M. The inquest on the dead body of the deceased Shaheed started at 7:00 A.M. on 15.01.1999 as the inquest could not be performed on the dead body in the night of

14.01.1999 on account of paucity of light. We do not find any iota of evidence on the record which may suggest that the first information report can be treated to be anti timed. We are of the view that keeping in view the totality of the circumstance, the first information report in this case is prompt and there is no chance of concoction in it.

Learned counsel for the appellant has further argued that the prosecution has not adduced any cogent and reliable evidence with regard to the motive available to the accused / appellant for committing the crime of murder. It has been submitted that whatever the motive attributed to the appellant, the same cannot be said sufficient for committing the crime like murder of Shaheed.

Again we fail to appreciate the argument. PW 1 Sukha in his cross examination has clearly deposed that about 15 to 20 days prior to the occurrence, there was a quarrel between accused/ appellant Ramzan and deceased Shaheed. He has also stated in his deposition that there was enmity between the decease Shaheed and the accused/appellant Ramzan and so many times quarrel between these two persons took place in the village. Therefore, it is quite clear that the enmity was there and that too between accused/appellant Ramzan and decease Shaheed. The evidence available on record also suggest that the accused/appellant and his associates did not touch the informant Sukha while he was also in the company of the deceased at the time of the occurrence. This situation clearly indicates that there was enmity between appellant Ramzan and the decease Shaheed and on account of the same this occurrence took place.

Learned counsel for the appellant further argued that the witnesses produced by the prosecution are absolutely chance witnesses and no reliance could be attached on their testimony. Our attention has been drawn towards the evidence of

prosecution in order to show that that it was not probable for the witnesses produced by the prosecution to have been present at the time of the occurrence.

We do not find any substance in this argument.

Learned Trial Court has also disbelieved the testimony of Manjoor Hasan PW 3 who has been produced by the prosecution as an eyewitness. This witness has deposed that he was returning to his village with his buffalo cart and he witnesses the incident on the way. The Court below on the basis of the evidence available on the record as well as on the basis of the witness produced by the defence has clearly observed that the presence of PW 3 Manjoor Hasan at the spot was not possible in any manner. In view of the statement of DW 1 Pankaj Kumar Saxena, DW 2 Makhan Lal and DW 3 Megh Raj, It is quite clear that sugar cane belonging to PW 3 Manjoor Hasan was weighed at 12:10 a.m. in the night of 14/15.01.1999 and thereafter empty buffalo cart was again weighed at 12:35 a.m. Although the sugar cane could be weighed by anyone on behalf of Manjoor Hasan but in view of the statement of PW3 Manoor Hasan, it reveals that he has deposed therein that he was returning from the sugar factory after getting his sugar cane weighed. Therefore, under the circumstances, it was not possible for this witness to be present at the place of occurrence on 14.11.1999 at 8:00 P.M. The Trial Court has rightly disbelieved the testimony of PW 3 Manjoor Hasan.

As far as the statements of PW 1 Sukha and PW 2 Naseem are concerned, it reveals that PW 1 Sukha is the person who was in the company of the deceased at the time of the occurrence. This witness has stated that he was going along with deceased Shaheed on a buffalo cart, and as soon as they reached Mirjapur crossing they saw that the accused/appellant along with his associates were standing over there and they stopped their cart

and started abusing. When Sukha asked the accused persons as to what was the reason, then the accused pushed Sukha behind and the assailants Nanu and Dhani, who were in the company of the appellant Ramzan, caught hold the deceased and appellant Ramzan fired at deceased, which hit at the neck of the deceased and he died at the sport. This witness has further stated that the firing at the deceased Shaheed took place from a very close range and the deposition of this witness finds corroboration with the medical evidence as there is blackening and tattooing around the wound of the deceased found by the Doctor at the time of the post mortem. The presence of this witness PW 1 Sukha in the company of the deceased at the time and the place of the occurrence cannot be disbelieved in any manner.

Again PW 2 Naseem has also been produced as an eye witness of the occurrence and he has stated that at the time of occurrence he was going to his village from Gobardhanpur where he used to sell milk. This witness has stated that the way leads to his village from Gobardhanpur, passes through the place of the occurrence. This witness has also stated that it were Nanu and Dhani who caught hold the deceased and appellant Ramzan fired at deceased Shaheed.

Learned Counsel for the appellant has tried to show certain omissions and contradicting in the statement of this witness but we are of the view that these omissions do not materially affect the prosecution case. It has been pointed out before us by the learned counsel for the appellant that PW 2 Naseem has clearly deposed in his deposition that Majoor Husan PW 3 was with him at the sport while the presence of Manjoor Husan was not possible in any manner at the place and time of the occurrence. Merely on the basis of this statement, the presence and the testimony of this witness cannot be doubted. The ocular version

which has been advanced by this witness before the court in his deposition finds a clear corroboration with the medical evidence.

Learned counsel for the appellant further submitted that there was no source of light available at the spot, hence the witness had no opportunity to identify the actual assailants.

Again we fail to appreciate this argument. The appellants are very well known to the witnesses, therefore, there was every chance available to the witnesses for identifying the real assailants. The witnesses have clearly deposed in their statements that they were having torches with them at the time of the occurrence and in the light of the torches they could see the incident and they have clearly deposed in what manner the incident took place.

Learned counsel for appellant has cited before us the decision of the **Hon'ble Apex Court reported in (2003) 9 Supreme Court cases, page 45, Baldeve Singh and Others Vs. State of MP** and on the basis of the judgment, submitted that in case if the chance witnesses failing to assign any convincing reason for being at the place of incident at the abnormal hour then the testimony of such witnesses, on facts could be treated to be unreliable.

We have thoroughly gone through the judgment cited before us and we are of the view that the facts in the judgment cited before us are entirely different and do not apply to the facts and circumstances of the present case. We have already observed in the instant case that the witnesses PW 1 Sukha and PW 2 Naseem cannot be disbelieved on this count alone that they are the chance witness. PW 1 Sukha, as we have already observed that he was in the company of the deceased and PW 2 Naseem had no other way to go to his home except the pathway where the incident took place. Therefore, the presence of PW 2 Naseem also appears to be quite natural and his testimony

Cannot be discarded merely on the ground that at the time of the occurrence he was passing through by chance.

Another important factor in the case is that the oral testimony finds full and complete support with the medical version adduced by the prosecution. PW 1 Sukha has stated in his deposition that the fire was shot from the very close range. He has also stated that the fire was shot at the neck of the deceased.

The postmortem report shows that there was blackening and tattooing around the wound. Doctor Rajeev Verma, PW 6 has deposed in his evidence that the firing took place from a very close range. The eyewitnesses have given specific version as to in what manner the incident took place and in the light of the medical version the testimony of the eye witnesses cannot be discarded in any way.

Our attention has been invited by the learned counsel for the appellant that the investigation in the present case has certain latches and those latches go to the root of the prosecution case and give a serious jolt to the prosecution version. He has submitted that non recovery of the buffalo-cart at the spot by the Investigation Office shakes the entire prosecution case as the story of the prosecution is that at the time of the occurrence the deceased and PW 1 Sukha were going on buffalo-cart. It has further been submitted that the I.O. has also not recovered any cartridge or pallets from the place of occurrence which again discredits the prosecution case. On the basis of these latches in the investigation, it has been argued by the learned counsel for the appellant that the murder, in fact, took place somewhere else but the prosecution has shown that the murder took place at the particular place of occurrence.

We do not find any force in this argument. It is true that I.O has not shown any buffalo-cart at the spot but the testimony of PW 8 Constable Balram Singh shows that he also visited the place of occurrence along with Investigating Office after the occurrence and he saw that the buffalo cart was standing at the place of the occurrence and it remained over there till the next morning. Therefore, if any shortcoming has been committed by the Investigating Officer during the course of the investigation the same is not going to discard of discredit the prosecution case. Secondly, if the Investigating Officer has not been successful in recovering any cartridge from the spot, the same will not again discards the prosecution case and the prosecution case on this ground will not become untrustworthy especially when the ocular version produced by the prosecution found material support by the medical evidence.

It is also important to mention here that the eye witnesses produced by the prosecution did not have any enmity with the appellant, therefore, there does not appear any reason as to why the eye witnesses would falsely implicate the appellant. The defence could not show anywhere from the deposition of the witnesses that these witnesses are in any sort of enemical terms with the appellant.

Learned counsel for the appellant has lastly submitted that the Trial Court has wrongly convicted the appellant Ramzan as it has acquitted rest of the two person namely Nanu and Dhani who are alleged to be in the company of the appellant at the time of the occurrence while the same set of evidence was produced by the prosecution against all of them.

We do not find any substance in this argument as the appellant Ramzan has been specifically attributed the role of firing at deceased Shaheed while the other persons have been attributed the role of catching hold of deceased at the time of the

occurrence. However, as per deposition of the witnesses, accused/ appellant Ramzan was in inimical term with Shaheed and none of the witnesses have deposed that Nanu and Dhani has also been in enemical terms with Shaheed. The only allegation against these two person, i.e., Nanu and Dhani that they are real brothers of appellant Ramzan, therefore, they were present at the scene of the occurrence alongwith main culprit, i.e. appellant Ramzan. It will be discussed later on as to whether Trial Court has rightly acquitted the assailants Nanu and Dhani or not, but at present merely by the acquittal of non appellant Nanu and Dhani the present appellant has no cause for his acquittal on the basis of the strength of the evidence available on the record.

The Hon'ble Apex Court in case reported in 2003 SCC Page 32 (Gangdhar Behra Vs. State of Orissa) has clearly ruled that "merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the accused who had been acquitted from those who were convicted."

In the instant case the accusation has been clearly established against the accused/appellant, therefore, the Court below has categorically indicated the differentiate feature of evidence so far as the acquitted and the convicted accused are concerned. There are catena of decisions that the Courts will have to separate grain from the chaff in order to find out the truth in each case as to what extent the evidence I acceptable.

On the basis of the evidence adduced by the prosecution in the instant case the Court below has rightly convicted the appellant – Ramzan under section 302 IPC and sentenced him to

life imprisonment along with fine of Rs. 3,000/- and in default, further rigorous imprisonment for six months.

We do not find any ground for interference in the impugned judgment and order passed by the court below, convicting the appellant Ramzan.

The appeal on behalf of the appellant Ramzan, thus bears no merits and is liable to be dismissed.

Now we take up the connected State Criminal Appeal No. 162 of 2003.

We have already observed that the Court below has given a categorical findings as well as distinguishing feature in evidence so far as the acquitted and convicted accused are concerned.

The State has preferred the appeal against the acquittal of accused Nanu and Dhani who have been attributed role of catching hold of the deceased at the time of the occurrence.

The learned Trial Court has disbelieved the evidence adduced by the prosecution on the count that the story of catching hold the deceased by the accused Nanu and Dhani does not appear to be convincing especially, when the case is of firing with the country made pistol. The evidence on records show that it was dark hours of the night and there was no source of light available at the spot. The only source of light available at the spot is the torches, which the witnesses were having with them. In case, if accused/appellant Ramzan fired at the deceased with the country made pistol then due to the dark hours of the night it does not appear to be convincing and plausible that the remaining assailants will catch hold the deceased. There was every possibility that the person catching hold the deceased could sustain injuries on account of firing.

The learned Trial Court has rightly accorded the benefit of doubt to the accused persons Nanu and Dhani on the basis of the

role attributed to them. We also find ourselves in agreement with view adopted by the Trial Curt.

The evidence on record show that the accused Nanu and Dhani are not alleged to have been armed with any weapon nor they are alleged to have caused any injury on the person of the deceased. The only role attributed to them is of caught hold the deceased. Normally, in a case where shooting is done by the fired arm, the victim is not caught by any other person as there is always risk to such person (who are catching hold of the victim) getting some fire arm injuries.

Learned A.G.A. has submitted that there was blackening present around the wound which shows that the shooting had been done from very close range and in such a case, catching hold of the victim by accused Nanu and Dhani cannot be said to be improbable or unnatural.

We do not find any substance in this argument as appellant/ accused Ramzan was not armed with factory made weapon but he was armed with a country made pistol and with such weapon any one can be shot with pallet would not go astray.

As per evidence, it was dark night, therefore, there was every possibility that the firing could have caused damage to the assailants who were catching hold of the victim at the time of occurrence. The deceased was a young man and he was bound to use all his strength in order to release himself and to go out of the firing range. When Ramzan took out his pistol and pointed towards him and in this process those who had caught hold of him would not be remain static but would have dis-balance endangering his own life.

Further, it also appears to be improbable that when a person is having a fire arm with him then he could have easily used the same in order to fire a shot at the deceased, therefore, there was no reason for the remaining assailants to catch hold of

the deceased at the time of the actual firing. Hence, on overall consideration of the matter, this part of the prosecution story that the accused Nanu and Dhani caught hold of the decease at the time when he was fired upon, looks artificial and unnatural and does not inspire complete confidence.

We, therefore, are not inclined to believe that part of the prosecution case, wherein role of catching hold the deceased has been assigned to Nanu and Dhani.

We may clarify that we are not doubting the main part of the prosecution case, namely, their presence on the spot but we are giving benefit of doubt to a limited extent to these accused by way of abandoned caution regarding the alleged role of catching hold of the deceased and we, therefore, find ourselves in full agreement with the view adopted by the Trial Court in this regard.

Learned AGA has further cited before us some judgment of the Hon'ble Apex Court in order to submit that mere present of the accused at the place of the occurrence makes them liable for the ultimate criminal act done by the several co-accused persons in furtherance of common intention of all of them. He has also submitted that in case accused Nanu and Dhani had common intention or object to kill deceased, the same is sufficient to hold them guilty u/s 302 read with Section 34 IPC.

We fail to appreciate the argument advance by the learned counsel for the State. **The Hon'ble apex Court in its decision reported in 2003, Supreme Court Cases Criminal, page 1965 (State of Rajasthan Vs. Raja Ram)** has clearly observed that 'generally the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence

adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent".

Therefore, it is very much clear on the basis of the principle propounded by the Hon'ble Apex Court that the Appellate Court, i.e. this Court, while considering the appeal against the judgemt of the acquittal is to interfere only when there are compelling and substantial reasons for doing so and in the instant case we do not find any substantial and compelling reason for setting aside the judgment of the Trial Court acquitting the respondent / accused Nanu and Dhani.

It is well settled principle in law that though the First Appellate Court like High Court sits as a Court of Appeal on facts also while considering an appeal from the judgment of the Trial Court and in that process it can re-appreciate the evidence on record to arrive at a just conclusion and while so re-appreciating the evidence, this Court should first analyse the findings of the Trial Court and then, for valid reasons to be recorded, this Court can reverse such findings of the Trial Court. Catena of decisions propounded by the Hon'ble Apex Court show that the Appellate Court while sitting as a Court of Appeal should not substitute the findings version of the Trial Court merely because another view is possible to be taken on the same sets of the facts.

In view of the aforesaid discussion of the evidence led by the prosecution in the case, we are satisfied that the Trial Court has not committed any error in acquitting the accused/respondent Nanu and Dhani. Therefore, we are of the view that the State Criminal Appeal filed against the acquittal of

Nanu and Dhani is also devoid of any merit and is liable to be dismissed.

With the result, the criminal appeal no. 320 of 2002 arising against the conviction of appellant Ramzan is dismissed while the State Criminal Appeal no. 162 of 2003 filed against the acquittal of the accused/respondents Nanu and Dhani is accordingly dismissed.

A copy of judgment shall be filed in the connected criminal appeal number 162 of 2003.

The record of the court below be returned immediately alongwith the copy of the judgment to the court concerned for necessary compliance.

(B.C. Kandpal, J.) **(M.M. Ghildiyal, J.)**

October 16, 2004:
NCM: